

PD-1092-20
In the Court of Criminal Appeals of Texas
At Austin

FILED
COURT OF CRIMINAL APPEALS
12/31/2020
DEANA WILLIAMSON, CLERK

◆
No. 01-19-00100-CR
In the Court of Appeals
For the First District of Texas
At Houston

◆
No. 1620108
In the 177th District Court
Of Harris County, Texas

◆
Ex parte Maurice Edwards
Appellant

◆
State's Petition for Discretionary Review

Clint Morgan
Assistant District Attorney
Harris County, Texas
State Bar No. 24071454
morgan_clinton@dao.hctx.net

500 Jefferson, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826

Kim Ogg
District Attorney
Harris County, Texas

Tiffany Larsen
Assistant District Attorney
Harris County, Texas

Oral Argument Requested

Statement Regarding Oral Argument

The State is asking this Court to address whether a pretrial writ is an appropriate remedy to address a fact-intensive non-constitutional limitations defense.

This is an appeal from the denial of relief on a pretrial habeas application raising a limitations defense. The issue is the Legislature's relatively new limitations scheme for sexual assault, which imposes different limitations periods depending on the facts of the offense and investigation. There have been several similar appeals in recent years, all of which involve intense factual inquiry, and none of which address cognizability.

The historical justifications that have allowed defendants to raise limitations defenses in pretrial writs do not apply to the current limitations scheme for sexual assault. Under current law, no sexual assault indictment is facially time barred, and, absent an *ex post facto* claim, pretrial habeas is not an appropriate vehicle to use for this sort of fact-intensive claim.

The State requests oral argument.

Identification of the Parties

Counsel for the State:

Kim Ogg, District Attorney of Harris County; **Tiffany Larsen**, Assistant District Attorneys on direct appeal; **Clint Morgan**, Assistant District Attorney on direct appeal and petition for discretionary review.

500 Jefferson, Suite 600
Houston, Texas 77002

Ashley Mayes Guice, former Assistant District Attorney, counsel on original application

1201 Franklin, 13th Floor
Houston, Texas 77002

Appellant:

Maurice Edwards

Counsel for the appellant on original application:

Kirk Oncken

440 Louisiana, Suite 900
Houston, Texas 77002

Counsel for the appellant on appeal:

Charles Hinton

P.O. Box 53719
Houston, Texas 77052-3719

Habeas Court:

Brian Warren, presiding judge

Table of Contents

Statement Regarding Oral Argument	2
Identification of the Parties.....	3
Table of Contents	4
Index of Authorities	6
Statement of the Case	8
Grounds for Review	8
1. The First Court erred by holding that a shotgun objection and a complaint about another part of the statute preserved the appellant's appellate argument. This conflicts with this Court's holding in <i>Resendez</i>	8
2. The First Court erred by holding that the State had to admit DNA test results at a pretrial habeas hearing challenging the validity of the charging instrument.....	8
3. This limitations claim is not cognizable on pretrial habeas because it is a fact-intensive non-constitutional defense. The appellant has an adequate remedy at law through a motion to quash.....	8
Reasons to Grant Review	9
Statement of Facts	10
Procedural Background	11
On original application, the appellant argued a code provision that exempts sexual assault from the statute of limitations did not apply to this case because his identity was "readily ascertained" at the time of the offense. The trial court disagreed and denied relief.....	11
In the First Court, the appellant argued the State failed to meet its burden of proof at the habeas hearing because it did not introduce DNA test results. The First Court agreed and reversed.	13
Ground One.....	15
The First Court erred by holding that a shotgun objection and a complaint about another part of the statute preserved the appellant's appellate argument. This conflicts with this Court's holding in <i>Resendez</i>	15

Ground Two	20
The First Court erred by holding that the State had to admit DNA test results at a pretrial habeas hearing challenging the validity of the charging instrument.	20
Ground Three	24
This limitations claim is not cognizable on pretrial habeas because it requires going beyond the face of the charging instrument.	24
Conclusion	30
Certificate of Compliance and Service	31
Appendix.....	1
<i>Ex parte Edwards</i> , 608 S.W.3d 325 (Tex. App.—Houston [1st Dist.] 2020, pet. filed.).....	1

Index of Authorities

Cases

<i>Burton v. State</i>	
805 S.W.2d 564 (Tex. App.— Dallas 1991, pet. ref'd)	26
<i>Cisneros v. State</i>	
290 S.W.3d 457 (Tex. App.— Houston [14th Dist.] 2009, pet dism'd.)	18
<i>Cisneros v. State</i>	
353 S.W.3d 871 (Tex. Crim. App. 2011)	19
<i>Demerson v. State</i>	
No. 07-18-00020-CR, 2019 WL 1646242 (Tex. App.— Amarillo Apr. 16, 2019, pet. filed) (mem. op., not designated for publication)	22
<i>Drewery v. State</i>	
08-04-00201-CR, 2005 WL 1791630 (Tex. App.— El Paso July 28, 2005, pet. ref'd) (mem. op., not designated for publication)	22
<i>Eisenhauer v. State</i>	
754 S.W.2d 159 (Tex. Crim. App. 1988)	18
<i>Ex parte Campozano</i>	
610 S.W.3d 572 (Tex. Crim. App.— Dallas 2020, pet. filed)	24
<i>Ex parte Dickerson</i>	
549 S.W.2d 202 (Tex. Crim. App. 1977)	26
<i>Ex parte Edwards</i>	
608 S.W.3d 325 (Tex. App.— Houston [1st Dist.] 2020, pet. filed.)	8, 14
<i>Ex parte Ellis</i>	
309 S.W.3d 71 (Tex. Crim. App. 2010)	25
<i>Ex parte Heilman</i>	
456 S.W.3d 159 (Tex. Crim. App. 2015)	29

<i>Ex parte Lovings</i>	
480 S.W.3d 106 (Tex. App.—	
Houston [14th Dist. 2015, no pet.]	13, 24
<i>Ex parte Montgomery</i>	
No. 14-17-00025-CR, 2017 WL 3271088 (Tex. App.—	
Houston [14th Dist.] August 1, 2017, pet ref'd)	
(not designated for publication)	13, 24
<i>Ex parte Smith</i>	
178 S.W.3d 797 (Tex. Crim. App. 2005)	25, 27
<i>Ex parte Weise</i>	
55 S.W.3d 617 (Tex. Crim. App. 2001)	26
<i>Ex parte Wheeler</i>	
203 S.W.3d 317 (Tex. Crim. App. 2006)	20
<i>Headrick v. State</i>	
988 S.W.2d 226 (Tex. Crim. App. 1999)	25
<i>Kniatt v. State</i>	
206 S.W.3d 657 (Tex. Crim. App. 2006)	20
<i>Proctor v. State</i>	
967 S.W.2d 840 (Tex. Crim. App. 1998)	29
<i>Resendez v. State</i>	
307 S.W.3d 308 (Tex. Crim. App. 2009)	9, 15, 16

Statutes

TEX. CODE CRIM. PROC. art. 12.01.....	12, 28
TEX. CODE CRIM. PROC. art. 12.02.....	27
TEX. CODE CRIM. PROC. art. 12.03.....	28
TEX. CODE CRIM. PROC. art. 12.05.....	27
TEX. GOV'T CODE § 411.141	14

Statement of the Case

The appellant was indicted for aggravated sexual assault. (2 RR 7). He applied for pretrial habeas relief based on the statute of limitations. (CR 4). The trial court denied relief. (CR 11).

The First Court of Appeals reversed and ordered the charge dismissed. The State filed a motion for en banc reconsideration, which the panel treated as a motion for rehearing and issued a new, published opinion, again reversing the trial court and ordering the trial court to grant habeas relief. *Ex parte Edwards*, 608 S.W.3d 325 (Tex. App.—Houston [1st Dist.] 2020, pet. filed.). The State filed a motion for rehearing from that opinion, which the panel denied.

Grounds for Review

- 1. The First Court erred by holding that a shotgun objection and a complaint about another part of the statute preserved the appellant's appellate argument. This conflicts with this Court's holding in *Resendez*.**
- 2. The First Court erred by holding that the State had to admit DNA test results at a pretrial habeas hearing challenging the validity of the charging instrument.**
- 3. This limitations claim is not cognizable on pretrial habeas because it is a fact-intensive non-constitutional defense. The appellant has an adequate remedy at law through a motion to quash.**

Reasons to Grant Review

The First Court's published opinion reached incorrect results on at least a couple of issues and will cause significant confusion if not overturned. The preservation holding relies on an outdated case and conflicts with this Court's recent precedent. On the merits, the First Court created a requirement that the State admit a very particular type of evidence at a hearing where the appellant had the burden of proof. And this claim probably isn't even cognizable on pretrial habeas because it requires factual development to attack a facially valid charging instrument.

The First Court's opinion conflicts with this Court's preservation holdings in *Resendez v. State*, 307 S.W.3d 308 (Tex. Crim. App. 2009). By allowing a shotgun objection to count as a valid objection, the First Court threatens to take jurisprudence back to the bad old days where defendants could sandbag the State and raise surprise complaints on appeal. Which is exactly what happened here. The appellant's argument in the habeas court regarded the interpretation of a legal phrase, but on appeal, when the State could no longer admit evidence, he raised a failure of proof claim.

In its substantive holding, the First Court created an evidentiary requirement from nothing. The statutes and case law do not require a specific form of evidence, but the First Court held the State had to admit the actual DNA test results at the hearing, not merely evidence showing the results exist. This requirement has no basis in the statute, and is pointless—is the habeas judge supposed to personally evaluate the results? Moreover, at a pretrial habeas hearing the applicant bears the burden of proof. The First Court did not explain why the State had a burden to produce *any* evidence at this hearing, much less the DNA results.

The State's third ground raises an argument not raised below: Is this even cognizable on pretrial habeas? For a pretrial habeas appeal, there's an awful lot of factual discussions in the record and in the First Court's opinion. Although historically this Court has allowed defendants to raise limitations claims through pretrial habeas, the limitations scheme the Legislature has adopted for sexual assault means the defense requires factual development that is not appropriate for a pretrial writ.

Statement of Facts

This is an appeal from a pretrial habeas application challenging an indictment, so the facts should not be important.

In 2003 the complainant told police she was sexually assaulted by a man named Maurice. (2 RR 14). The complainant was taken to a hospital where a sexual assault kit was done. (2 RR 15). Based on information from the complainant, police identified the appellant as a suspect. (2 RR 15). Police did not find the complainant credible and the investigation was closed soon after when the complainant stopped communicating with police. (2 RR 15, 17).

The sexual assault kit was tested for DNA in 2013, and the next year a CODIS hit came back to the appellant. (2 RR 23-25). The appellant was indicted in 2017. (2 RR 5).

Procedural Background

On original application, the appellant argued a code provision that exempts sexual assault from the statute of limitations did not apply to this case because his identity was “readily ascertained” at the time of the offense. The trial court disagreed and denied relief.

The appellant applied for a pretrial writ of habeas corpus, asking the habeas court to dismiss the indictment “because the statute of limitations bars prosecution for the alleged May, 2003 offense, in violation of the Sixth Amendment to the United States Constitution, Article I sec.

10 of the Texas Constitution, and Article 12.01 of the Texas Code of Criminal Procedure.” (CR 4-5).

The trial court held a hearing, where the appellant did not mention any constitutional claims but based his argument entirely on Code of Criminal Procedure Article 12.01. (1 RR 7, 18-25). Though it has since been amended in ways that do not affect this case, at the time that article provided a ten-year statute of limitations for sexual assault, except there was no statute of limitations if:

during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained.

Act of April 20, 2001, 77th Leg., R.S., ch. 12, 2001 Tex. Gen. Laws 20 (amended 2019) (current version at TEX. CODE CRIM. PROC. art. 12.01(1)(C)).

The only legal question the parties discussed was whether the appellant’s identity had been “readily ascertained” at the time of the investigation. (1 RR 20 (habeas court asking if defense’s counsel’s argument was “we knew who he was,” and defense counsel replying: “That’s a hundred percent my argument.”)). Defense counsel cited the habeas

court to cases on that exact issue. (1 RR 20) (discussing *Ex parte Montgomery*, No. 14-17-00025-CR, 2017 WL 3271088 (Tex. App.—Houston [14th Dist.] August 1, 2017, pet ref'd) (not designated for publication) and *Ex parte Lovings*, 480 S.W.3d 106 (Tex. App.—Houston [14th Dist. 2015, no pet.)).

In its ruling, the trial court said it was denying relief because it did not believe the appellant's identity was readily ascertained at the time of the investigation. (1 RR 25).

In the First Court, the appellant argued the State failed to meet its burden of proof at the habeas hearing because it did not introduce DNA test results. The First Court agreed and reversed.

On direct appeal, the appellant argued the State was required to admit the actual DNA testing results at the habeas hearing, and its failure to do so meant the 12.01(1)(C) exemption from the statute of limitations did not apply. (Appellant's Brief at 11-13, 15). The State responded that this argument was unpreserved, and the multiple references to DNA testing and CODIS hits in the record carried whatever burden the State had to show biological material was “collected and subjected to forensic DNA testing.” (State's Brief at 11-21).

The First Court held that the appellant preserved his argument with the shotgun objection in his application, and by stating at the hearing his “core position” was that “the ten-year statute of limitations did not apply.” *Ex parte Edwards*, 608 S.W.3d at 333-34.¹ The First Court also held that evidence police ran the DNA recovered from the complainant through CODIS was insufficient to show, as Article 12.01(1)(C) requires, that “forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily ascertained.” *Id.* at 336-37. Citing a definition from an unrelated section of the Government Code, the First Court held the State was “statutorily required” to admit the actual DNA test results at the hearing. *Id.* at 336. (citing TEX. GOV’T CODE § 411.141(7)). The First Court reversed and ordered the habeas court to grant relief. *Id.* at 337.

¹ On original submission, the First Court did not address preservation at all. The First Court issued a new opinion addressing preservation after the State filed a motion for en banc reconsideration.

Ground One

The First Court erred by holding that a shotgun objection and a complaint about another part of the statute preserved the appellant's appellate argument. This conflicts with this Court's holding in *Resendez*.

This Court has denounced the exact sort of preservation analysis the First Court conducted here. In *Resendez*, the defendant filed motions to suppress his statements invoking, without discussion, three amendments to the federal constitution, two sections of the Texas constitution, and three articles from the Code of Criminal Procedure, including “the safeguards required by ... Article 38.22.” *Resendez*, 306 S.W.3d at 310-11. At trial, Resendez asked for his statement to be suppressed because he had not been *Mirandized*. He pointed to the lack of *Miranda* warnings on the recording of his statement as proof. The trial court admitted the statement.

On appeal, Resendez complained the lack of recorded warnings violated Article 38.22 Section 3(a)(2)’s requirements to record *Miranda* warnings. The Fourteenth Court held Resendez’s reference to the recording preserved this complaint, and reversed. *Id.* at 312.

This Court granted review and held the argument was unpreserved. First, this Court noted the motion to suppress did not preserve

the complaint because “Article 38.22 contains a number of subsections that could have been applicable,” but the appellant’s motion did not specify which it was invoking. *Id.* at 313.

Second, this Court held the reference to the recording at the hearing did not preserve the argument. This Court analyzed several of its then-recent cases and stated a rule: “[A] complaint that could, in isolation, be read to express more than one legal argument will not generally not preserve all potentially relevant arguments for appeal. Only when there are clear contextual clues indicating that the party was, in fact, making a particular argument will that argument be preserved.” *Id.* at 314. This Court held Resendez’s argument at the hearing *could* be read in isolation to have preserved his appellate complaint, but the context of the argument showed he was complaining about something else.

Resendez’s analysis applies here.² The appellant’s habeas petition invoked, without argument or discussion, two constitutional provisions that guarantee almost every right recognized in a criminal trial, and a statute that is almost 800 words long and contains the limitations period

² The State discussed *Resendez* in its second motion for rehearing, which was denied without comment.

for every felony in Texas, including at least three provisions relating to sexual assault. *Resendez* makes clear that preserved nothing.³

The appellant’s statement that his “core position” was that “the ten-year statute of limitations does apply” is just like the trial argument in *Resendez*: It could express more than one legal argument. That means a reviewing court must look at the context to determine what argument the party was invoking.

The context makes clear the appellant was arguing the ten-year statute of limitations applied because the appellant was “readily ascertained,” thus the 12.01(1)(C)(i) exemption was inapplicable. Just after the “core position” comment defense counsel discussed two cases he had given the habeas court, which “talk[ed] about whether or not his identity is ascertainable, readily ascertainable.” (1 RR 18-21). Defense counsel’s argument, and the habeas court’s ruling, focus exclusively on interpreting the phrase “readily ascertained.”⁴ (1 RR 21-25).

³ *Resendez* did not use the phrase “shotgun objection,” but it applies both there and here: The objections “cite[d] many grounds … without argument and serve[d] only to obscure the specific grounds of the objection.” *Johnson v. State*, 263 S.W.3d 287, 290 (Tex. App.—Houston [1st Dist.] 2007, pet. ref’d, untimely filed)

⁴ The First Court claimed the trial court’s comments “indicate that it understood that the focus of the disagreement between the State and appellant … was centered on the third prong of the statutory provision—whether the forensic DNA testing results showed that the biological matter collected did not match the victim or any other person whose identity was readily ascertained.” *Edwards*, 608 S.W.3d 334. But

There is no hint anyone believed the appellant was asking for habeas relief because the State failed to admit the test results. *Resendez* makes clear this complaint was unpreserved.

The First Court admitted the parties “may have been more focused around the meaning of ‘readily ascertained,’” but held this was not “dispositive” because of what was raised in the appellant habeas application. *Edwards*, 608 S.W.3d at 335. Had the appellant’s application preserved anything, that would have been true. But as *Resendez* shows, it did not.

For this part of its holding, the First Court relied on *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988) and *Cisneros v. State*, 290 S.W.3d 457 (Tex. App.—Houston [14th Dist.] 2009, pet dism’d.).

In *Eisenhauer*, this Court held that a motion to suppress invoking, without argument, three amendments to the federal constitution and “the laws and Constitution of the State of Texas” preserved the argument that the Texas constitution had broader protections than the federal constitution. That holding would help the appellant, except it has

“the third prong” has multiple parts. The record shows the trial court focused on only one part, but the complaint on appeal regarded another.

The First Court’s statement that the parties were litigating “the third prong” is vague but accurate enough. The First Court’s use of this statement to imply the parties were litigating all parts of “the third prong” misrepresents the record.

been overruled *sub silentio*. *See Resendez*, 306 S.W.3d at 313 (unargued citations to multiple laws in motion preserves nothing); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) (claim that Texas constitution provides greater protection than federal constitution must first be raised in trial court).

Cisneros has a statement that supports the First Court's holding, but it relied on *Eisenhauer* and did not quote the defendant's motion so it's impossible to tell if its preservation holding was correct. *Cisneros*, 290 S.W.3d at 462-63. The State prevailed on the merits in *Cisneros*, so this Court was never asked to review the preservation holding. This Court granted Cisneros's petition for review but dismissed it as improvidently granted, possibly suggesting this Court intended to review the merits but noticed the matter was unreserved. *See Cisneros v. State*, 353 S.W.3d 871 (Tex. Crim. App. 2011). At any rate, *Cisneros* does not bind this Court, and the First Court erred to rely on it to the degree it caused them to ignore *Resendez*.

Preservation is particularly important for failure-of-proof claims like what the appellant raised on appeal. The record is crystal clear the State has DNA test results that fit the statutory requirements. Had the appellant raised his appellate complaint in the habeas court, the State

could have just admitted them. Instead, he sandbagged the State by not raising this argument until the appeal, and the First Court rewarded him with a reversal. That conflicts with the level of preservation this Court requires. This Court should grant review and reverse.

Ground Two

The First Court erred by holding that the State had to admit DNA test results at a pretrial habeas hearing challenging the validity of the charging instrument.

The First Court cited no statute, case law, or legal principle to support its holding that the Article 12.01(1)(C) exemption can be proved through only one type of evidence. Other than this case, there is no authority for the principle that the DNA test results themselves are “statutorily required” at a pretrial habeas hearing.

In an application for habeas relief, the applicant must prove his claim by a preponderance of the evidence. *Kniatt v. State*, 206 S.W.3d 657 (Tex. Crim. App. 2006). On appeal from pretrial habeas applications, appellate courts must view the record in the light most favorable to the habeas court’s ruling and uphold the ruling absent an abuse of discretion. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006).

Given that standard of review, it is apparent the First Court erred by placing the burden on the State to produce a particular type of evidence. That is, if the burden of proof is on the applicant, and the habeas court denies relief, logically the quality of the State's evidence cannot be a basis for concluding the habeas court abused its discretion.

Although the State did not admit the actual DNA test results—likely because before this case there was no statute or case requiring it to—the offense report the appellant admitted at the hearing supports a finding that this case qualifies for the 12.01(1)(C) exemption:

- “during the investigation of the offense biological material is collected”
 - The complainant was transported from the scene to a hospital where a sexual assault kit was done (2 RR 17)
 - Police requested the sexual assault kit be “examine[d] for semen, foreign fluids/hairs/fibers, any evidence pertaining to a sexual assault to determine DNA for comparison purposes.” (2 RR 20)
- “and subjected to forensic DNA testing”
 - Male DNA was recovered from the sexual assault kit (2 RR 31)
- “and the testing results show that the matter does not match the victim”
 - The recovered DNA was male, but the victim was female (*See* 2 RR 14-15 (describing victim as female))

- “or any other person whose identity is readily ascertained”
 - Police ran the DNA results through CODIS (2 RR 24-25).

It's true the offense report does not explicitly describe CODIS, but knowledge of CODIS is common in the criminal justice system and can be gained from case law. The Combined DNA Index System (CODIS) is a database that stores either *unknown* DNA profiles from crime scenes, or known profiles from certain, mainly convicted, individuals. *See Demerson v. State*, No. 07-18-00020-CR, 2019 WL 1646242, at *2 (Tex. App.—Amarillo Apr. 16, 2019, pet. filed) (mem. op., not designated for publication); *Drewery v. State*, 08-04-00201-CR, 2005 WL 1791630, at *7 (Tex. App.—El Paso July 28, 2005, pet. ref'd)(mem. op., not designated for publication) (explaining that CODIS comprises samples collected from suspected offenders and evidentiary samples, and developed DNA profiles from evidentiary items are entered and compared to known profiles in the database).

If police knew who the DNA came from, they would not have run it through CODIS. The act of running a DNA sample through CODIS is *prima facie* evidence investigators did not readily ascertain who it

came from. The offense report shows police requested a “CODIS analysis,” they later received a “CODIS match confirmation,” and three years later they contacted the complainant, who identified the appellant from a photo array. (2 RR 25-27).

The parties and the habeas court seemed familiar with CODIS. (*See* 1 RR 9-14 (prosecutor explaining identification of appellant as suspect, with no questions from habeas court or defense counsel about what CODIS is), 24 (defense counsel discussing import of “CODIS hit” under State’s legal theory)). On this record, the trial court did not abuse its discretion in finding the State’s evidence showed during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained.

But did the State even have a burden of proof in this case? The First Court cited no authority for the proposition that the State must prove its case in a pretrial habeas hearing. The general rule is that a habeas applicant has the burden of proof. Viewed through that light, the State did not have a burden to prove the exemption applied, rather the

appellant had a burden to prove it didn't. Rather than disprove the exemption, the appellant admitted the offense report which showed every element necessary for the exemption, and chose to litigate a legal definition.

Stated correctly, the standard of review here should have been: Did the trial court abuse its discretion in holding the appellant failed to prove this case did not fall within the 12.01(1)(C)(i) exemption? Phrased that way the answer is obvious: No.

Even if the State had some burden of proof, the First Court erred by holding it could be met by only one particular kind of evidence. This Court should grant review and reverse that decision.

Ground Three

This limitations claim is not cognizable on pretrial habeas because it requires going beyond the face of the charging instrument.

There have been several recent appellate opinions litigating defendants' pretrial writs about the Article 12.01(1)(C) exemption. *See, e.g., Ex parte Campozano*, 610 S.W.3d 572 (Tex. Crim. App.—Dallas 2020, pet. filed); *Ex parte Lovings*, 480 S.W.3d 106 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Ex parte Montgomery*, No. 14-17-

00025-CR, 2017 WL 3271088 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, pet. ref'd (not designated for publication)).

These cases, along with this case, all have two things in common: 1) They're fact intensive; 2) They never question whether this sort of fact-intensive non-constitutional claim is cognizable on pretrial habeas. This Court should grant review to address cognizability. The State asks this Court to hold that absent an *ex post facto* claim, an indictment for sexual assault or aggravated sexual assault will never be time barred based on the face of the indictment, so a limitations defense should be litigated through motions to quash or to the jury.

Texas law disfavors pretrial habeas applications because they entitle defendants to interlocutory appeals that disrupt trial proceedings.

Ex parte Smith, 178 S.W.3d 797, 801-02 (Tex. Crim. App. 2005). To guard against abuse of the writ, cognizability “is a threshold issue that should be addressed before the merits of the claim may be resolved.” *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). The writ is an inappropriate remedy if a defendant has an adequate remedy by law. *Headrick v. State*, 988 S.W.2d 226, 228 (Tex. Crim. App. 1999) (holding claim of non-constitutional collateral estoppel not cognizable on pretrial writ because defendant could raise claim on direct appeal); *see Ex parte*

Weise, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001)(listing claims that are not cognizable on pretrial writ because they require factual development, including speedy trial and suppression issues).

A defendant may use pretrial writs to challenge: 1) “the State’s power to restrain him at all”; 2) “the manner of his pretrial restraint”; and 3) “certain issues which, if meritorious, would bar prosecution or conviction.” *Smith*, 178 S.W.3d at 801.

To whatever degree it is cognizable, a limitations defense falls in the third category. But what is the theory under which a limitations claim can be a bar on prosecution?

In decades past, this Court allowed defendants to raise limitations claims on pretrial writs on the theory that if the face of an indictment showed a prosecution was barred by limitations, the indictment was “fundamentally defective” and did not confer jurisdiction on the trial court. *Ex parte Dickerson*, 549 S.W.2d 202, 203 (Tex. Crim. App. 1977). But after the 1985 constitutional amendments, which defined an indictment as a written instrument from a grand jury that charged a person with an offense, the fact that a charge is time barred does not render a charging instrument “fundamentally defective.” *Burton v. State*, 805 S.W.2d 564, 571 (Tex. App.—Dallas 1991, pet. ref’d).

In *Smith*, this Court addressed whether a defendant could challenge a defect in a tolling paragraph through a pretrial writ. A tolling paragraph is an allegation the State can make in an indictment showing some exception to the statute of limitations. For instance, in *Smith* the charge was for a misdemeanor committed at least four years before the charge was filed, but the tolling paragraph alleged circumstances that tolled the limitations period. *Smith*, 178 S.W.3d at 800; see TEX. CODE CRIM. PROC. arts. 12.02 (two-year limitations for misdemeanors), 12.05 (creating exceptions to limitations period).

Smith filed a pretrial writ alleging the charges against him were limitations barred because the tolling paragraph was inaccurate. This Court held that claim was not cognizable on pretrial writ because the indictment, on its face, was valid and any defects or inaccuracies in the tolling paragraph, even if they meant the charge were time barred, should be litigated through a motion to quash. *Smith*, 178 S.W.3d at 799, 804-05.

Although *Smith* dealt with a tolling paragraph, the same logic should apply here. In *Smith* the charge was obviously outside the period of limitations, so without the tolling paragraph the indictment would

have been facially invalid. Thus Smith's claim boiled down to challenging the factual support for a facially valid charging instrument.

The appellant was charged with aggravated sexual assault, which has the same limitations period as sexual assault. *See* TEX. CODE CRIM. PROC. art. 12.03(d). Sexual assault has two possible periods of limitations, depending on the facts of the offense and investigation. Ordinarily it has a limitations period of ten years, but it is exempt from limitations, the same as murder, in certain factual situations. TEX. CODE CRIM. PROC. art. 12.01(1)(C), (2)(E).

That is to say, without litigating the facts of the offense itself, a charge for sexual assault is never time barred on its face. The same as murder. No tolling paragraphs or additional language need be alleged in the indictment.

Except for constitutional rights that would bar a trial, the general rule is that pretrial habeas is not an appropriate vehicle to litigate claims that require factual development. *Ex parte Perry*, 483 S.W.3d 884, 899 (Tex. Crim. App. 2016). Except for *ex post facto* claims, limitations is just another non-constitutional defense. *Proctor v. State*, 967 S.W.2d 840,

844 (Tex. Crim. App. 1998) (limitations defense is forfeitable if not litigated through motion to quash or to jury); *Ex parte Heilman*, 456 S.W.3d 159, 168-69 (Tex. Crim. App. 2015) (same).

When a limitations defense requires the development of facts, as the appellant's does, it does not fall into *Smith*'s category of cases where pretrial habeas is appropriate because it is not apparent from the face of the indictment that the charge is time barred. Here, the habeas court considered the facts of appellant's offense and the investigation before making its ruling. That looks like the sort of claim that should be resolved through trial motions and jury arguments—like speedy-trial, collateral-estoppel, and suppression issues—rather than the sort of claim that is litigated through pretrial habeas.

The limitations defense is important, and the appellant has a colorable claim. But lots of colorable claims of important defenses are litigated in motions to quash and at trial, many of them successfully, without disrupting proceedings with interlocutory appeals. This Court should grant review and reverse the First Court because the trial court did not abuse its discretion in denying relief on a non-cognizable claim.

Conclusion

The State asks this Court to grant review and reverse the First Court's judgment.

KIM OGG
District Attorney
Harris County, Texas

/s/ C.A. Morgan
CLINT MORGAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826
Texas Bar No. 24071454

Certificate of Compliance and Service

I certify that, according to Microsoft Word, the portion of this brief for which Rule of Appellate Procedure 9.4(i)(1) requires a word count contains 4,280 words.

I also certify that I have requested that efile.txcourts.gov electronically serve a copy of this brief to:

Charles Hinton
chashinton@sbcglobal.net

Stacey Soule
information@spa.texas.gov

/s/ C.A. Morgan
CLINT MORGAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826
Texas Bar No. 24071454

Date: December 30, 2020

Appendix

Ex parte Edwards, 608 S.W.3d 325 (Tex. App.—Houston [1st Dist.] 2020, pet. filed.)

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Ex parte Campozano](#), Tex.App.-Dallas, September 23, 2020

608 S.W.3d 325
Court of Appeals of Texas, Houston (1st Dist.).

EX PARTE Maurice EDWARDS, Appellant

NO. 01-19-00100-CR

Opinion issued August 4, 2020

Rehearing Denied October 27, 2020

Synopsis

Background: Applicant sought pretrial writ of habeas corpus, asserting that ten-year statute of limitations barred prosecution for aggravated sexual assault of an adult. The 209th District Court, Harris County, denied application. Applicant appealed.

The Court of Appeals, [Julie Countiss](#), J., held that exception to ten-year statute of limitations for offense of aggravated sexual assault did not apply.

Reversed and remanded with instructions.

Procedural Posture(s): Motion for Rehearing; Motion for Reconsideration; Appellate Review; Post-Conviction Review.

***327 On Appeal from the 209th District Court, Harris County, Texas, Trial Court Case No. 1620108**

Attorneys and Law Firms

[Charles Hinton](#), Houston, for Appellant.

[Kim Ogg](#), District Attorney, Harris County, Tiffany C. Larsen, Houston, for State.

Panel consists of Justices [Lloyd](#), [Landau](#), and [Countiss](#).

OPINION ON REHEARING

[Julie Countiss](#), Justice

**¹ Appellee, the State of Texas, has filed a motion for en banc reconsideration of our August 27, 2019 opinion and judgment.¹ Treating the motion for en banc reconsideration as a request for a panel rehearing,² we deny the motion for rehearing, withdraw our opinion and judgment of August 27, 2019, and issue this opinion and new judgment in their stead.³ We dismiss the State's motion for en banc reconsideration as moot.⁴

¹ See [TEX. R. APP. P. 49.7](#).

² See *id.* 49.1.

³ See [Wooters v. Unitech Int'l, Inc.](#), 513 S.W.3d 754, 757 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (treating motion for en banc reconsideration as request for panel rehearing, vacating original opinion and judgment, issuing new opinion and judgment in their stead, and dismissing motion for en banc reconsideration as moot); see also [Butler v. State](#), 6 S.W.3d 636, 637 & n.1 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

⁴ See [Buxton v. State](#), 526 S.W.3d 666, 671, 692 n.9 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); [Wooters](#), 513 S.W.3d at 757; see also [Giesberg v. State](#), 945 S.W.2d 120, 131 n.3 (Tex. App.—Houston [1st Dist.] 1996), aff'd, 984 S.W.2d 245 (Tex. Crim. App. 1998).

Appellant, Maurice Edwards, challenges the trial court's order denying his pretrial application for a writ of habeas corpus. In his sole issue, appellant contends that the trial court erred in denying his requested habeas relief because the ten-year statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault.⁵

⁵ See [TEX. PENAL CODE ANN. § 22.021\(a\), \(e\)](#)

(“Aggravated Sexual Assault”); *see also* TEX. CODE CRIM. PROC. ANN. arts. 12.01(2)(E), 12.03(d); *Ex parte Tamez*, 38 S.W.3d 159, 160 (Tex. Crim. App. 2001) (application for writ of habeas corpus proper vehicle to invoke statute of limitations “if the pleading, on its face, shows that the offense charged is barred by limitations”); *Ex parte Montgomery*, No. 14-17-00025-CR, 2017 WL 3271088, at *3 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, pet. ref’d) (mem. op., not designated for publication) (offense of aggravated sexual assault “carries the same limitations period as sexual assault”).

We reverse and remand.

Background

On November 16, 2017, a Harris County Grand Jury issued a true bill of indictment, alleging that on or about May 2, 2003, appellant committed the felony offense of aggravated sexual assault.⁶ Appellant filed a verified pretrial application for a writ of habeas corpus, asserting that he had been “confined and restrained of liberty *328 by the [s]heriff of Harris County, Texas in the Harris County Jail” and his confinement and restraint were illegal because the applicable statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault in violation of the Sixth Amendment to the United States Constitution, Article I section 10 of the Texas Constitution, and Article 12.01 of the Texas Code of Criminal Procedure.⁷ Appellant sought “dismissal of the charge [against him as] being outside the statute of limitations.”⁸

⁶ See TEX. PENAL CODE ANN. § 22.021(a), (e) (“Aggravated Sexual Assault”).

⁷ See U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 12.01.

⁸ See *Ex parte Tamez*, 38 S.W.3d at 160.

**2 The trial court held a hearing on appellant’s application. Appellant offered, and the trial court admitted into evidence without objection, a copy of the complaint, the indictment, Texas Code of Criminal Procedure Article 12.01, and a Houston Police Department (“HPD”) offense report. The parties “stipulate[d] to the facts that [were] in the offense report” for the purposes of the hearing.

In the report, HPD Officer B.K. Foley stated that, on May 2, 2003, he was “dispatched to a sexual assault [that had] just occurred,” and upon his arrival, “the complainant was at the scene” and the perpetrator was not present. He spoke with the complainant, who said that the alleged perpetrator’s name was “Maurice” and she “d[id] not know his last name or phone number off hand,” had met him when she worked at the Moments Cabaret strip club, and had “gone out with [him] a few times.” On the day of the sexual assault, she “called [Maurice] to come and pick her up from a friend[’]s house” and he was “going to eventually give her a ride to [a convenience store] where her boyfriend was supposed to be waiting.” However, Maurice drove past the store and into an apartment complex, where the complainant “tried to get out of the vehicle” as Maurice began “grabbing her and hitting her.” When the complainant tried to get away, Maurice started to choke her. Maurice then “took her clothes [off] and had sex with her.”

Emergency assistance personnel transported the complainant to a hospital “to have a rape kit done.” Officer Foley “ran the license plate [number] of [Maurice’s] vehicle,” which two witnesses at the scene had given to him. The information he received from “r[unning] the license plate [number]” indicated that “there was a city warrant on the vehicle for a Maurice Edwards[, date of birth] 11-13-77,” along with a Texas driver’s license number. Foley then “ran the criminal history on [Maurice Edwards] and the info[rmination] matched” the information that the complainant had provided. In his report, Foley identified “one possible suspect” as “Edwards, Maurice Ellis.” Foley also noted that the complainant was “very hysterical and hard to interview,” “often did not answer questions and appeared to not be telling the whole truth about her relationship with [Maurice] and how they met both originally and [on the day of the sexual assault],” and “often tried to change the subject and appeared to be withholding information.”

On May 6, 2003, HPD Officer L.D. Garretson, who had been assigned to the investigation, supplemented the offense report, stating that there had not been a supplement to the offense report made “regarding the recovery/tagging of the complainant’s sexual assault kit into the HPD property room.” Garretson listed “Maurice

Ellis Edwards” as the “suspect” who sexually assaulted the complainant. On May 15, 2003, HPD Officer M.T. Walding supplemented the offense report, stating that he had stopped a car that matched *329 the description of Maurice’s car, the driver was “identified as Tommie C. []Lewis,” and “[t]he passenger claimed he was Jason Lewis.” When Walding asked Tommie “when he last saw Maurice,” Tommie answered, “about a year ago.” Walding called the complainant, who stated that “this was obvious[ly] a lie,” and she advised Walding that neither of the men fit the description of Maurice.

On May 16, 2003, Officer Garretson reviewed “[the] complainant’s sexual assault examination forensic report forms for [submission] to the HPD crime lab for DNA analysis and comparison purposes.” In his supplement to the offense report, he noted that the complainant had not attempted to contact him and had not responded to the “Sex Crimes Unit Contact Letter” that he had sent to her on May 6, 2003. According to Garretson, “[u]ntil ... contact” from the complainant was received, the status of the investigation was “case cleared due to lack of prosecution by [the] complainant.” Garretson against listed “Maurice Ellis Edwards” as the “suspect.”

**3 A November 7, 2013 supplement to the offense report by Officer Limscop reflects that laboratory testing “in association with a request for outsourced – DNA analysis” was completed. And a February 5, 2014 supplement to the offense report by Office Limscop shows that a laboratory analysis “in association with a request for CODIS^[9] analysis” was completed.

⁹ “CODIS” stands for “Combined DNA Index System.” *Segundo v. State*, 270 S.W.3d 79, 83 n.3 (Tex. Crim. App. 2008); see also TEX. GOV’T CODE ANN. § 411.141(1) (“‘CODIS’ means the FBI’s Combined DNA Index System” and “includes the national DNA index system sponsored by the FBI”); *Williams v. State*, No. 09-14-00463-CR, 2017 WL 1455962, at *1 n.1 (Tex. App.—Beaumont Apr. 19, 2017, no pet.) (mem. op., not designated for publication) (describing CODIS as “the combined DNA electronic database system that houses DNA profiles from different sources”).

On April 13, 2014, HPD Officer J.H. Lewis supplemented the offense report, stating that on March 13, 2014, he had received the case “for further investigation regarding a CODIS match confirmation.” On August 22, 2017, HPD Officer N. Vo updated the offense report, stating that he had interviewed the complainant, who “positively identified [Maurice] through [a] photo[graphic] array

even though the [sexual assault] happened 13 years ago.” He further stated that the Harris County District Attorney’s Office had “advised [him] that charges for aggravated sexual assault were accepted” and a search warrant for buccal swabs from Maurice, who was “currently in jail for another charge,” would be obtained.

On September 20, 2017, Officer Vo obtained two buccal swabs from appellant and submitted them for DNA analysis and comparison “to the male DNA that was found in the complainant’s sexual assault kit.” In Vo’s November 1, 2017 supplement to the offense report, he noted that the laboratory results from the buccal swabs were still pending. “However, the case ha[d] been thoroughly investigated” and “charges [had been] filed.”

No other evidence was offered or admitted at the hearing, and no witnesses testified. In response to appellant’s habeas application, the State argued that, under [Texas Code of Criminal Procedure Article 12.01\(1\)\(C\)\(i\)](#), no statute of limitations applied to the felony offense of aggravated sexual assault allegedly committed by appellant because biological matter was collected during the investigation, the matter was subjected to forensic DNA testing, and the testing results showed that the biological matter “d[id] not match the victim or any other person whose identity *330 [was] readily ascertained.”¹⁰ According to the State, all “three prongs ... set out under [Article] 12.01(1)(C)(i) ha[d] been met,” there were “no issues with the statute of limitations with [appellant’s] case,” and appellant’s requested habeas relief “should be denied.”

¹⁰ See [TEX. CODE CRIM. PROC. ANN. art. 12.01\(1\)\(C\)\(i\)](#).

While presenting its argument at the hearing, the State also focused on “the proper definition of ‘readily ascertained’ ” and whether appellant was “absolutely ascertainable” but was not “readily ascertained,” as [Article 12.01\(1\)\(C\)\(i\)](#) required for no statute of limitations to apply.¹¹ The State asserted that it “did not have the link to [appellant] based on his DNA until 2014,” and “[w]ithout a DNA profile being obtained from the testing of the [sexual assault] kit, a suspect, under the law, has not been readily ascertained.” In other words, appellant was not “readily ascertained to a point where the State believed that it had gathered enough evidence sufficient to prove [its] case beyond a reasonable doubt until the CODIS hit and the subsequent identification of [appellant] out of [the photographic array] by the complainant, which did not occur until 2017.”

¹¹ See *id.*

4 In contrast, appellant, at the hearing, reiterated that his “core position” was that “the ten-year statute of limitations d[id] apply”¹² to his case, he was “not ... indicted until 2017,” although the alleged sexual assault took place in 2003, the prosecution of appellant for the felony offense of aggravated sexual assault was “time-barred,” and he was entitled to habeas relief. As to **Texas Code of Criminal Procedure Article 12.01(1)(C)(i), appellant directed the trial court to two cases that addressed whether **Texas Code of Criminal Procedure Article 12.01(1)(C)(i)**’s exception eliminates the general ten-year statute of limitations applicable to the felony offense of aggravated sexual assault. Appellant also responded to the State’s argument regarding whether appellant constituted a “person whose identity [was] readily ascertained.”¹³

¹² See *id.* arts. 12.01(2)(E), 12.03(d).

¹³ See *id.* art. 12.01(1)(C)(i).

At the conclusion of the hearing, the trial court denied appellant’s requested habeas relief.

Standard of Review

A pretrial writ of habeas corpus is an extraordinary remedy. *Ex parte Ingram*, 533 S.W.3d 887, 891 (Tex. Crim. App. 2017); see also *Ex parte Arango*, 518 S.W.3d 916, 923 (Tex. App.—Houston [1st Dist.] 2017, pet. ref’d) (proper use of pretrial habeas relief is where “conservation of judicial resources would be better served by interlocutory review” (internal quotations and citation omitted)). A defendant may use a pretrial writ in very limited circumstances, including to challenge a court’s jurisdiction if the face of the indictment shows that the statute of limitations bars a prosecution. *Ex parte Smith*, 178 S.W.3d 797, 802 (Tex. Crim. App. 2005); *Ex parte Tamez*, 38 S.W.3d 159, 160 (Tex. Crim. App. 2001). Limitations is an absolute bar to prosecution. See *Ex parte Smith*, 178 S.W.3d at 802.

The applicant for a writ of habeas corpus has the burden to establish his entitlement to relief by preponderance of

the evidence. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). We review the trial court’s ruling on a pretrial application for a writ of habeas corpus for an abuse of discretion. *See id.*; *Ex parte Arango*, 518 S.W.3d at 923–24; *331 *Washington v. State*, 326 S.W.3d 701, 704 (Tex. App.—Houston [1st Dist.] 2010, no pet.). In doing so, we view the facts in the light most favorable to the trial court’s ruling and defer to the trial court’s implied factual findings that are supported by the record. *See Kniatt*, 206 S.W.3d at 664; *Washington*, 326 S.W.3d at 704. When the resolution of the ultimate issue turns on an application of purely legal standards, our review is de novo. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999); *Ex parte Leachman*, 554 S.W.3d 730, 737 (Tex. App.—Houston [1st Dist.] 2018, pet. ref’d).

Limitations

In his sole issue, appellant argues that the trial court erred in denying him habeas relief because the applicable ten-year statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault and **Texas Code of Criminal Procedure Article 12.01(1)(C)(i)**’s exception to the general ten-year statute of limitations did not apply. *See TEX. CODE CRIM. PROC. ANN. arts. 12.01(1)(C)(i), (2)(E), 12.03(d); see also Ex parte Montgomery*, No. 14-17-00025-CR, 2017 WL 3271088, at *3 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, pet. ref’d) (mem. op., not designated for publication) (offense of aggravated sexual assault “carries the same limitations period as sexual assault”).

A statute of limitations protects one accused of an offense “from having to defend [himself] against [a] charge[] when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” *Hernandez v. State*, 127 S.W.3d 768, 772 (Tex. Crim. App. 2004) (internal quotations omitted); see also *Ibarra v. State*, 11 S.W.3d 189, 193 (Tex. Crim. App. 1999) (“The applicable statute of limitations is the primary assurance against bringing an unduly stale criminal charge.”); *State v. Schunior*, 467 S.W.3d 79, 81 (Tex. App.—San Antonio 2015), aff’d, 506 S.W.3d 29 (Tex. Crim. App. 2016). As the Texas Court of Criminal Appeals has observed, if a defendant receives adequate notice of a charge, he can preserve those facts that are essential to his defense. *See Hernandez*, 127 S.W.3d at 772. A statute of limitations is construed strictly against the State and liberally in favor of the defendant. *See Ex*

parte Lovings, 480 S.W.3d 106, 111 (Tex. App.—Houston [14th Dist.] 2015, no pet.); Schunior, 467 S.W.3d at 81.

**5 Generally, the statute of limitations for the felony offense of aggravated sexual assault of an adult¹⁴ is ten years from the date of the commission of the offense. See TEX. CODE CRIM. PROC. ANN. arts. 12.01(2)(E), 12.03(d); see also *Ex parte Goodbread*, 967 S.W.2d 859, 865 (Tex. Crim. App. 1998) (Baird, J., concurring); *Ex parte Montgomery*, 2017 WL 3271088, at *3 (offense of aggravated sexual assault “carries the same limitations period as sexual assault”); *In re Joyner*, No. 01-17-00053-CR, 2017 WL 1326099, at *1 (Tex. App.—Houston [1st Dist.] Apr. 11, 2017, orig. proceeding) (mem. op., not designated for publication). But there is no statute of limitations for the felony offense of aggravated sexual assault if it is established that during the investigation of the offense biological matter was collected and subjected to forensic DNA testing and the testing results show that the matter did not match the victim or any other person whose identity was readily ascertained. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte Montgomery*, 2017 WL 3271088, at *1–4 (limitations period for sexual assault and aggravated sexual assault eliminated if Article 12.01(1)(C)(i) *332 requirements are satisfied); *Martinez v. State*, No. 03-12-00273-CR, 2014 WL 1208774, at *2 (Tex. App.—Austin Mar. 20, 2014, no pet.) (mem. op., not designated for publication); cf. *Dallas Cty. Dist. Attorney’s Office v. Hoogerwerf*, No. 2-05-034-CV, 2005 WL 3436557, at *2 (Tex. App.—Fort Worth Dec. 15, 2005, no pet.) (mem. op., not designated for publication) (explaining statute of limitations for offense of sexual assault, “where the identity of the assailant is readily ascertained,” is ten years from commission of offense).

¹⁴ See TEX. PENAL CODE ANN. § 22.021(a) (“Aggravated Sexual Assault”).

Texas Code of Criminal Procedure Article 12.01(1)(C)(i) does not impose “a duty on the State to look for a match” or a temporal limit on the State’s investigation. See *Ex parte Lovings*, 480 S.W.3d at 111–12. Nevertheless, for Article 12.01(1)(C)(i)’s exception to the general ten-year statute of limitations to apply, each of the three prongs set forth in Article 12.01(1)(C)(i) must be met. See *Ex parte S.B.M.*, 467 S.W.3d 715, 719 (Tex. App.—Fort Worth 2015, no pet.). Thus, it must be established that: (1) during the investigation of a sexual assault, biological matter was collected, (2) the biological matter was subjected to forensic DNA testing, and (3) the forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily

ascertained. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719.

Here, appellant does not dispute that biological matter was collected and subjected to forensic DNA testing. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719. Rather, he asserts that there is no evidence of forensic DNA testing results showing that the biological matter collected did not match the victim or any other person whose identity was readily ascertained, as Article 12.01(1)(C)(i) requires. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719.

A. Preservation

As an initial matter, the State asserts that appellant did not preserve his argument that “the State never provided the trial court with the type of statutorily required evidence [of forensic DNA testing results] that is necessary to trigger [Texas Code of Criminal Procedure] Article 12.01(1)(C)(i)’s exception to the ten-year ... statute of limitations,” and as such, appellant is not entitled to habeas relief.¹⁵

¹⁵ See *Bekendam v. State*, 441 S.W.3d 295, 299–301 (Tex. Crim. App. 2014) (addressing State’s preservation argument).

Preservation of error is generally a prerequisite for being granted habeas relief. See *Garza v. State*, 435 S.W.3d 258, 261–62 (Tex. Crim. App. 2014); see, e.g., *Ex parte Nelson*, No. 01-19-00325-CR, 2019 WL 6315197, at *3 (Tex. App.—Houston [1st Dist.] Nov. 26, 2019, pet. ref’d) (mem. op., not designated for publication); *Ex parte Palacios*, No. 08-16-00220-CR, 2018 WL 8807230, at *1–2 (Tex. App.—El Paso July 24, 2018, no pet.) (not designated for publication) (affirming trial court’s denial of relief requested in appellant’s pretrial application for writ of habeas corpus and holding defendant did not preserve error “as to one of [her] constitutional challenges brought for the first time on appeal”). To preserve error, Texas Rule of Appellate Procedure 33.1(a) requires a complaining party to make an objection or complaint to the trial court with “sufficient specificity[,] ... unless the specific grounds were apparent from the context.” TEX. R. APP. P. 33.1(a). Essentially, the *333 complaining party must inform the trial court as to what he wants and why he thinks he is entitled to it, and to do so clearly enough for the trial court to understand him at a time when it is in a proper position to do something about it.

See *Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014); *Keeter v. State*, 175 S.W.3d 756, 760 (Tex. Crim. App. 2005); see also *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002) (appellate court reviews trial court's ruling in light of what was before trial court at time ruling made).

**6 However, in determining whether a party has preserved his complaint for appellate review, an appellate court must avoid splitting hairs. *Keeter*, 175 S.W.3d at 760; *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) (appellate courts "should reach the merits of th[e] complaints without requiring that the parties read some special script to make their wishes known"). We are not hyper-technical in our examination of whether error was preserved, and we must consider the context when determining whether a party has preserved a complaint. See *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014); *Keeter*, 175 S.W.3d at 760; see also *Leal v. State*, 469 S.W.3d 647, 649 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("Error preservation does not involve a hyper-technical or formalistic use of words or phrases; rather, straightforward communication in plain English is sufficient. ... We consider the context in which the complaint was made and the parties' shared understanding at the time.").

In his pretrial application for a writ of habeas corpus, appellant asserted that "[h]e [had been] charged with [the felony offense of] [a]ggrevated [s]exual [a]ssault alleged to have been committed in May, 2003" and he had been "confined and restrained of liberty by the [s]heriff of Harris County, Texas in the Harris County Jail." According to appellant, his confinement and restraint were illegal because the applicable statute of limitations barred his prosecution for the alleged felony offense of aggravated sexual assault *in violation of* the Sixth Amendment to the United States Constitution, Article I, section 10 of the Texas Constitution, and Article 12.01 of the Texas Code of Criminal Procedure. (Emphasis added.) See U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 12.01. Appellant sought "dismissal of the [aggravated sexual assault] charge [against him as] being outside the statute of limitations." See *Ex parte Powell*, 570 S.W.3d 417, 420 (Tex. App.—Waco 2019, no pet.) (in determining whether defendant preserved his constitutional challenges asserted on appeal, considering whether defendant raised such complaints in his pretrial application for a writ of habeas corpus or before trial court at hearing); *Ex parte Perez*, 536 S.W.3d 877, 880–81 (Tex. App.—Houston [1st Dist.] 2017, no pet.); see also *Ex parte Letizia*, No. 01-16-00808-CR, 2019 WL 610719, at *4 (Tex. App.—Houston [1st Dist.] Feb. 14, 2019, pet. ref'd)

(mem. op., not designated for publication).

At the hearing on appellant's habeas application, the State responded to appellant's request for habeas relief by asserting that, pursuant to Texas Code of Criminal Procedure Article 12.01(1)(C)(i), "no statute of limitations" applied to the felony offense of aggravated sexual assault allegedly committed by appellant. According to the State, under Article 12.01(1)(C)(i), "if there's biological matter collected during the investigation that is subjected to forensic DNA testing and ... the testing results show [that] the biological matter does not match the victim or any person whose identity is readily ascertained," then there is "no limitations." And the State asserted *334 that in appellant's case, "the three prongs ... set out under [Article] 12.01(1)(C)(i) ha[d] been met," there were "no issues with the statute of limitations with [appellant's] case," and appellant's requested habeas relief "should be denied." Cf. *Ex parte Lovings*, 480 S.W.3d at 108–12 (addressing merits of appellate issue of whether Article 12.01(1)(C)(i) applied, where defendant filed pretrial application for writ of habeas corpus, arguing ten-year statute of limitations applied to felony offense of sexual assault, State responded defendant's case was "governed by the [statute-of-limitations] exception established" by Article 12.01(1)(C)(i), and trial court denied defendant's requested habeas relief); see also *Ex parte S.B.M.*, 467 S.W.3d at 716–20 (addressing merits of appellate issue of whether trial court erred in determining Article 12.01(1)(C)(i)'s exception to statute of limitations applied, where appellant filed petition for expunction, arguing he was entitled to expunction related to his 2003 arrest for offense of sexual assault because "he had never been charged with the offense and ... his prosecution for it was no longer possible because the ten-year statute of limitations period had expired," and State responded prosecution was "still possible because th[e] [offense of] sexual assault fell within [A]rticle 12.01(1)(C)[(i)]'s exception to the general ten-year sexual assault statute of limitations").

**7 In response to the State's argument at the hearing, appellant reiterated that his "core position" was that "the ten-year statute of limitations d[id] apply" to his case, he was "not ... indicted until 2017," although the alleged offense took place in 2003, the prosecution of appellant for the felony offense of aggravated sexual assault was "time-barred," and he was entitled to habeas relief. During his argument, appellant referenced *Ex parte Montgomery* and *Ex parte Lovings*—two cases which address whether Texas Code of Criminal Procedure Article 12.01(1)(C)(i)'s exception eliminates the ten-year statute of limitations generally applicable to the felony offense of aggravated sexual assault. See

Montgomery, 2017 WL 3271088, at *1–4; *Ex parte Lovings*, 480 S.W.3d at 108–09.

Notably, the trial court’s comments during the hearing indicate that it understood that the focus of the disagreement between the State and appellant over the applicability of Article 12.01(1)(C)(i)’s exception was centered on the third prong of the statutory provision—whether the forensic DNA testing results showed that the biological matter collected did not match the victim or any other person whose identity was readily ascertained. See *Chase*, 448 S.W.3d at 11 (error preserved where record showed trial court understood defendant’s request to include matters about which he complained on appeal); *Zavala v. State*, No. 05-16-00227-CR, 2017 WL 2180700, at *4 (Tex. App.—Dallas May 18, 2017, no pet.) (mem. op., not designated for publication) (to determine preservation, appellate court “look[s] for statements or actions on the record that clearly indicate the trial court’s ... understanding”).

While the parties and the trial court did spend a fair amount of time at the hearing discussing whether appellant, under Article 12.01(1)(C)(i)’s third prong, constituted a “person whose identity [was] readily ascertained,” this was partly because the trial court allowed the State to present its responsive argument first at the hearing and the State chose to focus on the “readily ascertained” portion of Article 12.01(1)(C)(i)’s third prong. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i) (no statute of limitations for felony offense of aggravated sexual assault if “during the investigation of the offense biological matter is collected and subjected to forensic DNA *335 testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained” (emphasis added)). The trial court then asked appellant for his response to that portion of the State’s argument.

Still yet, even if the parties’ arguments at the hearing may have been more focused around the meaning of “readily ascertained” and whether appellant’s “identity [was] readily ascertained,” this is not dispositive of our preservation-of-error analysis. See *Eisenhauer v. State*, 754 S.W.2d 159, 160–61 (Tex. Crim. App. 1988), overruled on other grounds by *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991); *Cisneros v. State*, 290 S.W.3d 457, 462–63 (Tex. App.—Houston [14th Dist.] 2009) (although parties’ arguments at hearing focused on one ground raised by defendant, to preserve error movant need not discuss at hearing all grounds raised in motion), *pet. dism’d, improvidently granted*, 353 S.W.3d 871 (Tex. Crim. App. 2011). Here, the trial court made clear at the hearing that it understood that “the

general statute of limitations in 2003 for [aggravated] sexual assault was ten years” and it was tasked with determining whether, pursuant to Article 12.01(1)(C)(i), “certain conditions [had been] met” that would “hold[] the statute of limitations.” See *Chase*, 448 S.W.3d at 11 (error preserved where record showed trial court understood defendant’s request to include matters about which he complained on appeal); *Keeter*, 175 S.W.3d at 760 (must consider context when determining whether party preserved complaint); see also *Leal*, 469 S.W.3d at 649. Further, that appellant may have refined his argument on appeal or expressed it more clearly and succinctly does not mean that he has not preserved it for appellate review. See *Sullivan v. Abraham*, 488 S.W.3d 294, 297 (Tex. 2016).

**8 Based on the foregoing, and considering both appellant’s pretrial application for a writ of habeas corpus and the hearing on appellant’s application, we hold that appellant preserved his argument that Texas Code of Criminal Procedure Article 12.01(1)(C)(i)’s exception to the general ten-year statute of limitations did not apply to his case because there was no evidence of forensic DNA testing results showing that the biological matter collected did not match the victim or any other person whose identity was readily ascertained, as Article 12.01(1)(C)(i) requires. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719.

B. Applicability of Article 12.01(1)(C)(i)

As previously noted, there is no statute of limitations for the felony offense of aggravated sexual assault if it is established that: (1) during the investigation of a sexual assault, biological matter was collected, (2) the biological matter was subjected to forensic DNA testing, and (3) the forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily ascertained. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); see also *Ex parte Montgomery*, 2017 WL 3271088, at *1–4 (limitations period for sexual assault and aggravated sexual assault eliminated if Article 12.01(1)(C)(i) requirements are satisfied); *Ex parte S.B.M.*, 467 S.W.3d at 719; *Martinez*, 2014 WL 1208774, at *2.

Appellant does not dispute that the first and second prongs of Texas Code of Criminal Procedure Article 12.01(1)(C)(i) are met. Instead, our focus is on the third prong—whether the forensic DNA testing results showed that the biological matter collected did not match the victim or any other person whose identity was readily ascertained. See

12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 719. Appellant asserts that the *336 evidence presented at the hearing on his habeas application did not include forensic DNA testing results showing that the biological matter collected did not match the victim or any other person whose identity was readily ascertained, which is necessary to trigger Article 12.01(1)(C)'s exception to the generally applicable ten-year statute of limitations. For instance, according to appellant, the record does not contain any "CODIS type evidence" or a "Crime Lab [a]nalysis report." The State responds that "the forensic DNA testing results show[ed] that the biological material collected did not match the victim or any other person whose identity [was] readily ascertained, in this case [appellant]." (Emphasis omitted.)

At the hearing on appellant's habeas application, the parties stipulated to the facts contained in the HPD offense report that the trial court admitted into evidence without objection. That offense report showed that emergency assistance personnel transported the complainant to a hospital "to have a rape kit done," a "rape/sexual assault kit" was submitted for forensic testing, and laboratory testing was completed "in association with a request for outsourced – DNA analysis" and "a request for CODIS analysis." In April 2014, Officer Lewis received the case "for further investigation regarding a CODIS match confirmation." In 2017, Officer Vo interviewed the complainant, who identified appellant in a photographic array. Vo also obtained two buccal swabs from appellant and requested a DNA analysis of the buccal swabs and a comparison of "the DNA to the male DNA that was found in the complainant's sexual assault kit."

**9 To eliminate the statute of limitations for the felony offense of aggravated sexual assault, Texas Code of Criminal Procedure Article 12.01(1)(C)(i) requires "testing results" from forensic DNA testing performed on the collected biological matter. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 716–20; see also TEX. GOV'T CODE ANN. § 411.141(7) (defining, for purposes of state DNA database, "DNA record" as "results of a forensic DNA analysis performed by a DNA laboratory," including "a DNA profile and related records"). This is because in order for Article 12.01(1)(C)(i) to apply, the "testing results" must "show" that the tested biological matter did not match the victim or any person whose identity was readily ascertained. See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i); *Ex parte S.B.M.*, 467 S.W.3d at 716–20.

Evidence showing the assignment of the case "for further investigation regarding a CODIS match confirmation"

and a request to analyze appellant's buccal swabs for comparison "to the male DNA that was found in the complainant's sexual assault kit" does not constitute evidence of forensic DNA testing results to show that the biological matter collected in the complainant's "sexual assault kit" did not match a person whose identity was not readily ascertained. In fact, any laboratory results from the buccal swabs were still pending at the time of the hearing. See *Ex parte S.B.M.*, 467 S.W.3d at 716–20 (examining evidence admitted at hearing and concluding Article 12.01(1)(C)(i)'s exception did not apply when biological matter was collected and tested but testing results were not attainable); cf. *Ex parte Lovings*, 480 S.W.3d at 108 (evidence presented showed DNA analysis identified DNA of complainant and male donor, and CODIS provided "hit" between appellant's DNA and the DNA of the male donor"). Because the record does not establish that: (1) during the investigation of a sexual assault, biological matter was collected, (2) the biological matter was subjected to forensic DNA testing, and (3) the forensic DNA testing results showed that the matter did not match the victim or any other person whose identity was readily ascertained, we conclude that *337 Texas Code of Criminal Procedure Article 12.01(1)(C)(i)'s exception to the general ten-year statute of limitations does not apply to appellant's case.¹⁶ See TEX. CODE CRIM. PROC. ANN. arts. 12.01(1)(C)(i), (2)(E), 12.03(d); see also *Ex parte Montgomery*, 2017 WL 3271088, at *1–4 (limitations period for sexual assault and aggravated sexual assault eliminated if Article 12.01(1)(C)(i) requirements are satisfied); *Ex parte S.B.M.*, 467 S.W.3d at 716–20; *Martinez*, 2014 WL 1208774, at *2.

¹⁶ As previously noted, the record in this case shows that during the hearing on appellant's habeas application, the parties and the trial court discussed whether appellant, under Article 12.01(1)(C)(i)'s third prong, constituted a "person whose identity [was] readily ascertained" or "readily ascertainable at the time." (Emphasis added.) See TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(i). To clarify, Article 12.01(1)(C)(i) requires forensic DNA testing results that "show that the matter does not match the victim or any other person whose identity is readily ascertained," not "readily ascertainable." See *id.*; *Ex parte Lovings*, 480 S.W.3d 106, 112 (Tex. App.—Houston [14th Dist.] 2015, no pet.). However, in this case, we need not address whether and when appellant's identity was "readily ascertained" because there is no statutorily required evidence of forensic DNA testing results. See TEX. R. APP. P. 47.1.

That being said, Officer Foley stated in the

offense report that the complainant provided appellant's first name—"Maurice"—at the scene. The complainant later provided a description of "Maurice" to Officer Walding, who had contacted her by telephone. Further, witnesses at the scene provided the license plate number for appellant's car and when Foley "ran the license plate [number]," the information he received indicated that "there was a city warrant on the vehicle for a Maurice Edwards[, date of birth] 11-13-77," along with a Texas driver's license number. The offense report also shows that Foley "ran the criminal history on [Maurice Edwards] and the info[r]mation matched" the information that the complainant had provided. From this, Foley ascertained "one possible suspect" as "Edwards, Maurice Ellis." Officer Garretson's supplements to the offense report from four days after the sexual assault and fourteen days after the sexual assault list "Maurice Ellis Edwards" as the "suspect" who sexually assaulted the complainant.

****10** Accordingly, we hold that the trial court erred in denying appellant's requested habeas relief.

We sustain appellant's sole issue.¹⁷

¹⁷ The State argues that appellant's "prayer for relief and discharge is ineffectual" because, even if

appellant is correct, the appropriate remedy is "to reverse and remand for a new hearing, at which time the State would offer the [DNA] testing results, thereby remedying the complained-of error." The State, however, does not present any argument or authority in support of remanding the case to the trial court for a new hearing on appellant's application for habeas relief.

Conclusion

We reverse the trial court's order denying appellant's requested habeas relief and remand this matter to the trial court with instructions to enter an order granting appellant the habeas relief requested in his pretrial application for a writ of habeas corpus. *See TEX. R. APP. P. 31.3.*

All Citations

608 S.W.3d 325, 2020 WL 4457985

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Clinton Morgan
Bar No. 24071454
morgan_clinton@dao.hctx.net
Envelope ID: 49324946
Status as of 12/31/2020 8:29 AM CST

Associated Case Party: Maurice Edwards

Name	BarNumber	Email	TimestampSubmitted	Status
Charles Hinton		chashinton@sbcglobal.net	12/30/2020 11:28:42 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	12/30/2020 11:28:42 PM	SENT